87-65

No. -

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1987

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UNITED STATES OF AMERICA,
PETITIONER,

*v.*

PROVIDENCE JOURNAL COMPANY AND CHARLES M. HAUSER,
RESPONDENTS.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

## QUESTIONS PRESENTED

I. Whether a trial judge has authority to restrain publication while considering an unprecedented conflict between First Amendment and Fourth Amendment rights.

II. Whether a prior restraint order involving an unprecedented question of priority of Fourth Amendment rights of privacy versus First Amendment rights of free press was "transparently invalid."

## LIST OF PARTIES

After an order of the United States District Court for the District of Rhode Island was violated, William A. Curran, a private, disinterested attorney, was appointed as a special prosecutor in accordance with Rule 42(b) of the Rules of Criminal Procedure. A special prosecutor was required because the United States Attorney for the District of Rhode Island represented parties to the underlying action and the attorney for the party in the underlying action who was aggrieved by violations of the order declined to appear as prosecutor.

The proceedings below are criminal contempt proceedings instituted by the special prosecutor against respondents Providence Journal Company and Charles M. Hauser, its executive editor. The contempt proceedings below are entitled *In The Matter of Application to Adjudge The Providence Journal Company and its Executive Editor, Charles M. Hauser, In Criminal Contempt.*

Petitioner in these proceedings is the United States of America.

The respondents before this Court are the Providence Journal Company and Charles M. Hauser.



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*v.*

PROVIDENCE JOURNAL COMPANY AND CHARLES M. HAUSER,
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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered on December 31, 1986 and modified by an en banc order and opinion issued on May 12, 1987, in a proceeding entitled *In the Matter of Application to Adjudge The Providence Journal Company And Its Executive Editor, Charles M. Hauser, In Criminal Contempt*.

## Opinions Below

The initial opinion of the Court of Appeals for the First Circuit is reported in the advance sheet at 809 F.2d 63 but was withdrawn from the bound volume pending the motion for rehearing and rehearing en banc. The initial opinion is reprinted in the appendix hereto, p. A-27, *infra*. The en banc addendum to that opinion is reported at __ F.2d __ and is reprinted in the appendix hereto, p. A-47, *infra*.

The opinion of the United States District Court for the District of Rhode Island (Boyle, C.J.) is reported at 630 F.Supp. 993. A later rescript order imposing sentences has not been reported. The District Court's opinion and order are reprinted in the appendix hereto, pp. A-1 and A-23, *infra*.

## Jurisdiction

Criminal contempt proceedings were instituted against respondents in the United States District Court for the District of Rhode Island under Rule 42(b) of the Rules of Criminal Procedure. Jurisdiction was based upon 18 U.S.C. §401(3). Respondents were found to be in criminal contempt and sentences were imposed.

On respondents' appeal, the United States Court of Appeals for the First Circuit, through a three judge panel, entered, on December 31, 1986, a judgment and opinion reversing the District Court's order. On May 12, 1987 a petition for rehearing was denied, although the Court of Appeals did issue an en banc addendum and modification of the panel's initial opinion.

The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. §1254(1).



## Statutes Involved

*Rules of Criminal Procedure, Rule 42.* CRIMINAL CONTEMPT

(b) DISPOSITION UPON NOTICE AND HEARING. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

*18 U.S.C.* §401. POWER OF COURT.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as—

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command.

*United States Constitution, Amendment I.*

RELIGIOUS AND POLITICAL FREEDOM. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

*United States Constitution, Amendment IV.*

UNREASONABLE SEARCHES AND SEIZURES. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## Statement of the Case

From 1962 to 1965 the Federal Bureau of Investigation (hereinafter FBI) tapped the telephones of Raymond L. S. Patriarca, a reputed organized crime figure. This surveillance was conducted without a warrant in violation of Patriarca's Fourth Amendment rights. The FBI's tape recordings of Patriarca's telephone conversations were destroyed but logs and memoranda were retained. The illegally intercepted conversations involved not only Raymond L. S. Patriarca but also his son, Raymond J. Patriarca.

In the late 1970's, during Raymond L. S. Patriarca's lifetime, respondent Providence Journal Company (hereinafter "Journal"), a Rhode Island newspaper, unsuccessfully sought to obtain from the FBI, under the Freedom of Information Act, 5 U.S.C. §552, the fruits of the illegal government searches and seizures. *See Providence Journal Company* v. *Federal Bureau of Investigation*, 460 F.Supp. 762 and 460 F.Supp. 778 (D. R.I. 1978), 595 F.2d 889 and 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980). In 1985, after Raymond L. S. Patriarca's death, the Journal again asked the FBI to produce the Patriarca materials. The FBI assented to that request and furnished the materials to the Journal, as well as to several other news media.

On November 8, 1985 Raymond J. Patriarca filed a complaint against the FBI, its director, the United States Department of Justice, the Attorney General, the Journal and a



Rhode Island television station, WJAR-TV 10. The complaint sought, among other things, that the Journal be enjoined from publication of the illegally gathered information. Along with the complaint Patriarca filed a motion for a temporary restraining order and/or injunctive relief.

On November 13, 1985 at about 12:30 p.m. a chambers conference was held by Chief Judge Boyle to consider Patriarca's motion. Chief Judge Boyle indicated that he would schedule the matter for a hearing the next morning. Counsel for the media defendants objected to a hearing that soon, since they needed time to prepare and present legal authorities in objection to Patriarca's request. Therefore, rather than a hearing being scheduled for the morning of November 14, 1935, a hearing was scheduled for November 15, 1985. Believing at that time Patriarca was raising a novel issue concerning the priorities of Fourth Amendment rights of privacy and the First Amendment, and wishing to prevent irreparable harm to Patriarca, the trial judge preserved the status quo by entering a temporary restraining order enjoining publication by the Journal and WJAR-TV 10 regarding the illegally obtained materials pending the November 15, 1985 hearing. The restraining order was eventually vacated by Chief Judge Boyle on November 19, 1985.

A decision by the Journal to publish articles subject to the temporary restraining order had to be made by 10:30 p.m. on November 13, 1985 in order to meet the Journal's next cycle of publication. At no time was the court advised of this fact by the Journal; nor was the court informed that the newspaper intended to publish such articles.

No request was made by the Journal to vacate or stay the order. No petition for mandamus was made to the Court of Appeals. No appeal of the temporary restraining order was taken.

On November 14, 1985 the Journal and Charles M. Hauser, its executive editor, in violation of the court's November 13, 1985 order, published articles concerning the materials illegally gathered by the FBI.

Moving from arguments directed to the constitutionality of the temporary restraining order — arguments that cannot seriously be entertained — petitioner urges that the Court of Appeals erred in any event in refusing to enforce that order whether or not it was patently unconstitutional. This proposition is plainly incorrect.

The Court of Appeals has explicitly declared that even when an order is transparently invalid, a good-faith effort must be made to obtain judicial review if it is practicable to do so. Since, the court concluded, it could not determine that timely emergency relief was available in this case within the relevant time period — and since the requirement that such efforts be made had not before been clearly established[5] — the court concluded that the unconstitutional order involved in this action could not serve as a basis for a finding of contempt.

Moreover, it is demonstrably wrong to urge, as petitioners do, that the First Circuit "misread" this Court's decision in *Walker v. City of Birmingham*, 338 U.S. 307 (1967), in concluding that "transparently invalid" orders can be challenged by means of contempt proceedings. Petition at 7 (citing to A-33).[6] Although this Court affirmed the contempt convictions

[5] The First Circuit had previously suggested in no uncertain terms that a newspaper faced with a transparently unconstitutional and invalid prior restraint could test the order by violating it. In *United States v. Arthur Andersen & Co.*, 623 F.2d 720 (1st Cir.), *cert. denied*, 449 U.S. 1021 (1980), the First Circuit declared moot a challenge by Arthur Andersen to a court order directing it to comply with an IRS subpoena of its workpapers for a client, after Andersen had surrendered the documents. The First Circuit, discussing this Court's decision in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), stated that Andersen could have kept its claim viable if it had "tested the court's order by violating it and contesting the resulting contempt sanction" — an option the Court noted was available to the media petitioners in *Nebraska Press*. *Id.* at 724. Of course, that is precisely what the Journal did here.

[6] Petitioner's brief strongly suggests, without actually so stating, that the "transparently invalid" exception to the usual rule requiring obedience to temporary restraining orders was created *ex nihilo* by the First Circuit in the context of this case. Indeed, petitioner's brief never even acknowledges the important fact that the words "transparently invalid" were expressly used by this Court in *Walker*. (388 U.S. at 315).



at issue in *Walker*, it specifically cautioned that "this is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity." 388 U.S. at 315.[7] Quoting this Court's langauge verbatim, the First Circuit concluded that its "unmistakable import" was that "a transparently invalid order cannot form the basis for a contempt citation." (A-33) (footnote omitted).[8]

After adopting the principle explicitly alluded to by this Court in *Walker* — that a transparently invalid order cannot be the predicate for a contempt citation — the Court of Appeals simply applied this key principle to the facts in the record. The First Circuit neither created a new rule of law nor altered rules previously established by this Court. Rather, the court carefully analyzed the facts in the particular case before it in the light of clear and well-established precedent.

Petitioner's reliance on this Court's decision in *Walker* is misplaced for other reasons as well. In *Walker*, this Court took great care to distinguish "pure speech" from speech

[7] The jurisprudential implications of the "transparently invalid" exception noted in *Walker* are significant. That exception gives due recognition to the principle that no mandate should be subject to blind obedience. The individual retains the ultimate right to question the validity of an order promulgated by any authority; justice does not require that punishment should follow the failure to adhere to a transparently invalid order. Although transparently invalid judicial orders may indeed be rare, the recognition that they may exist and need not be obeyed is profoundly important. It is in this light that Judge Wisdom's statement that "court orders are not sacrosanct" (A-34) should be understood. *See also Johnson v. Virginia*, 373 U.S. 61 (1963).

[8] The omitted footnote from the First Circuit's opinion (n.26) contains citations to a legal treatise, to two state court contempt cases, and to the Fifth Circuit's opinion in *United States v. Dickinson*, 465 F.2d 496 (1972) (discussed *infra*).

mixed with conduct. Writing for the majority in *Walker*, Justice Stewart quoted with approval the following passage from *Cox v. Louisiana*, 379 U.S. 536, 555 (1965):

> " 'We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.' "

388 U.S. at 316. Here there is no dispute that "pure speech" was involved, and this fact further demonstrates that the First Circuit's decision is entirely consistent with *Walker*.[9]

Furthermore, it should be borne in mind that the First Circuit in this case in effect promulgated an additional procedural prerequisite to the invocation of the transparent invalidity exception. Specifically, in unambiguous dictum in its en banc opinion, the First Circuit announced that henceforth a publisher subject to a temporary restraining order which it considers to be transparently invalid should make a good faith effort to obtain emergency appellate relief. (A-48).[10] It

[9] Prior restraints on speech are, of course, presumptively unconstitutional. *See, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.")

[10] The First Circuit's promulgation of this further prerequisite to the invocation of the transparent invalidity exception highlights the fact-specific nature of the instant case. In view of the fact that the seeking of emergency appellate relief is now a prerequisite, there is no reasonable possibility that a case similar to the instant case will arise in the future. Given the statement contained in the en banc court's opinion, publishers now know precisely what they must do if they wish to avail themselves of the transparent invalidity exception.

As for the instant case, the en banc court specifically stated that it lacked "a clear conviction that timely emergency relief was available within the restraints governing the publisher's decision making" and that it would be "unfair to subject the publisher to the very substantial sanctions imposed by the district court because of its failure to follow the procedure we have just announced." (A-49).



is thus clear that the "transparently invalid" exception recognized in *Wolker* has in no sense been expanded by the First Circuit, but rather has been made the subject of special procedural requirements.

Finally, it is simply incorrect for petitioners to urge that the Court of Appeals' opinion in this action (written by a Judge of the Court of Appeals for the Fifth Circuit) is inconsistent with the Fifth Circuit's opinion in *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972). In actuality, the Fifth Circuit's opinion in that case supports the key principle on which the First Circuit's analysis is based. In *Dickinson*, the court explicitly acknowledged that transparent invalidity constituted an exception to the usual rule that a court order must be obeyed. *Id.* at 509.[11] The First Circuit cited *Dickinson* precisely for this legal point (A-33 n.26) and then distinguished those aspects of *Dickinson* which were dissimilar to the instant case. The First Circuit noted that *Dickinson* involved an order issued to protect a defendant's Sixth Amendment right to a fair trial, whereas the order in this case was issued "merely to protect an individual's interest in privacy." (A-43 n.65).[12] The instant case, in contrast to *Dickinson*, does not involve a tension between competing constitutional mandates; there simply is no genuine Fourth Amendment issue in this case.

[11] Several state high courts have also held that when the press is subject to a transparently invalid and unconstitutional prior restraint on publication, the order, if violated, may be defeated on the merits. *E.g., Cooper v. Rockford Newspapers, Inc.*, 50 Ill. App. 3d 250, 365 N.E.2d 746 (1977) (order not to publish editorial subject to collateral attack); *State v. Coe*, 101 Wash. 2d 364, 679 P.2d 353 (1984) (en banc) (prior restraint on publication of tape recordings subject to collateral attack); *Wood v. Goodson*, 253 Ark. 196 485 S.W.2d 213 (1972) (order not to publish what transpired in open court held void and subject to collateral attack).

[12] In distinguishing the *Dickinson* result, the First Circuit also noted that the decision predated the strict test relative to prior restraints enunciated by this Court in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). (A-43 n.65).

## Conclusion.

For the reasons stated above, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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